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No. 98-436

Supreme Court, U. S.

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In The  
Supreme Court of the United States  
October Term, 1998

JOHN ALDEN, *et al.*,

*Petitioners,*

v.

STATE OF MAINE,

*Respondent.*

On Writ Of Certiorari  
To The Maine Supreme Judicial Court

BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Notwithstanding the Tenth Amendment, the Eleventh Amendment, and general principles of State sovereign immunity, does Congress have the power under the Commerce Clause to abrogate State sovereign immunity in state court when it lacks the power to abrogate such State sovereign immunity in federal court?

2. Is Maine prohibited from asserting its sovereign immunity in state court from a damages claim under the Fair Labor Standards Act when Congress lacks the power to abrogate such sovereign immunity, when Maine has not expressly waived its sovereign immunity, and when Maine is expressly exempt from suit under the most analogous state statute?

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## STATEMENT OF THE CASE

The private petitioners, current and former probation officers, seek damages in state court from the State of Maine on the grounds that Maine did not properly pay them overtime pursuant to section 7 of the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 207. The petitioners concede that they cannot seek such damages from Maine in federal court following *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The petitioners, therefore, seek to have the Court endorse the counter-intuitive principle that when Congress lacks authority under the Commerce Clause to abrogate a State's sovereign immunity in federal court, it nevertheless has authority to abrogate such immunity in state court. We briefly recap the factual background and the private petitioners' federal and state lawsuits against the State of Maine.

**Factual Background.** In 1976, the Court ruled that the FLSA could not be applied constitutionally to States under the Tenth Amendment. *National League of Cities v. Usery*, 426 U.S. 833 (1976). Both before and after that decision, Maine paid certain state employees overtime (on more generous terms than the FLSA requires) under its collective bargaining agreements. Beginning in 1978, collective bargaining agreements between the State of Maine and some state employees stipulated that those workers whose positions required them to work irregular hours would receive an additional 16% premium over their base salary in lieu of overtime. See *Blackie v. Maine*, 75 F.3d 716, 719 (1st Cir. 1996). Probation officers' jobs satisfied this requirement, and thus they received the 16% non-standard premium in lieu of overtime. *Id.*

In 1985, the Court overruled *National League of Cities* and held that the FLSA could constitutionally be applied

to States. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Following that decision, "Maine promptly evaluated its work force to determine which state jobs came under the FLSA's overtime compensation provisions and which did not." *Blackie v. Maine*, 75 F.3d at 719. Although Maine concluded that many positions were covered by the FLSA (and thus began paying those workers overtime), it concluded that probation officers were exempt from the FLSA overtime provisions as professional employees, 29 U.S.C. § 213(a)(1). *Blackie v. Maine*, 75 F.3d at 719-20.

For probation officers, and other similarly situated state employees, Maine negotiated collective bargaining agreements that provided the affected workers would continue to receive the 16% non-standard premium in lieu of overtime so long as they continued to be exempt from the overtime provisions of the FLSA. *See id.* at 720-27. This was scarcely a contract of adhesion – the private petitioners later complained that their take-home pay could decrease (and, in fact, did decrease) when they began receiving overtime instead of the 16% non-standard premium in lieu of overtime. *See id.* at 725 n.5.

**Federal Court Lawsuits.** In December 1992, the private petitioners, along with other probation officers, filed suit in United States District Court against Maine, alleging that Maine had not properly paid them overtime under the FLSA. Petition Appendix ("Pet. App.") 2a. In addition to disputing the claims on the merits, Maine asserted affirmative defenses based on sovereign immunity.

Subsequently, the District Court held that the private petitioners were not entirely exempt from the overtime requirements of the FLSA, but were partially exempt as law enforcement officers. *Mills v. Maine*, 839 F. Supp. 3

(D. Me. 1993). The District Court then determined the method of calculating the overtime owed to the private petitioners. *Mills v. Maine*, 853 F. Supp. 551 (D. Me. 1994). This lawsuit was dismissed on Eleventh Amendment grounds before any party could seek review of these substantive rulings.

Because the private petitioners could receive, under the collective bargaining agreement, either the 16% non-standard premium in lieu of overtime *or* overtime, but not both, following the District Court's decision, beginning on February 6, 1994, Maine began to pay the petitioners overtime, which has continued to this day. Pet. App. 15a-16a. The petitioners do not – and cannot – allege that there is any on-going violation of the FLSA. Thus, this case involves solely a claim for retroactive monetary relief directly against the State. Pet. App. 16a.

While the private petitioners' FLSA overtime lawsuit was pending, the private petitioners filed a second lawsuit in United States District Court against the State of Maine. Proving that irony is no stranger to the law, the private petitioners alleged that Maine and five state officials had engaged in retaliation under the FLSA, 29 U.S.C. § 215(a)(3), by paying the private petitioners overtime instead of the 16% non-standard premium in lieu of overtime. This claim was rejected by the District Court and by the First Circuit. *Blackie v. Maine*, 888 F. Supp. 203 (D. Me. 1995), *aff'd*, 75 F.3d 716 (1st Cir. 1996).

In the FLSA overtime suit, the District Court appointed a special master to calculate the overtime after virtually all of the private petitioners chose to contest the accuracy of their own time records. *See Mills v. Maine*, 118 F.3d 37, 41 (1st Cir. 1997). Following extensive proceedings, the special master issued tentative rulings, largely rejecting the private petitioners' figures.

While the parties' objections to the special master's report were pending, this Court decided *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In light of that decision, Maine moved to dismiss the federal lawsuit for lack of subject matter jurisdiction. The District Court dismissed the suit, which was affirmed on appeal by the First Circuit. *Mills v. Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997). The private petitioners did not seek review of that decision in this Court, and thus the petitioners concede that Congress lacked the authority to abrogate State sovereign immunity in federal court when it exercised its powers under the Commerce Clause to enact the Fair Labor Standards Act.

**State Court Lawsuit.** Following dismissal of their federal court suit, in July 1996, the private petitioners filed the present suit against the State of Maine in the Maine Superior Court, seeking damages for the same past alleged FLSA violations. Joint Appendix ("Jt. App.") 9-10, 26-27. Once again, in addition to disputing the FLSA claims on the merits, Maine asserted an affirmative defense based on sovereign immunity. Jt. App. 17.

In July 1997, the Superior Court granted judgment on the pleadings to Maine based on the State's sovereign immunity defense. Pet. App. 14a-24a. "Simply put, if a plaintiff can't seek damages against the state for violations of federal law in federal court, the plaintiff can't seek damages in state court either." Pet. App. 20a.

The private petitioners then appealed to the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"). Over a dissent, in August 1998, the Law Court affirmed dismissal of the private petitioners' claims. *Alden v. State*, 715 A.2d 172 (Me. 1998); Pet. App. 1a-13a. The court rejected the anomalous result advocated by the

petitioners, namely, that the only forum for private enforcement of a federal statute was state court:

The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." [*Seminole Tribe v. Florida*,] 517 U.S. at 72. Thus, the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in federal courts but provided no comparable protection in their own courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the *Seminole Tribe* case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.

Pet. App. 6a. In so holding, the Law Court relied on numerous prior decisions in which it had construed the State's sovereign immunity in state court as congruent with Eleventh Amendment immunity in federal court. *See* Pet. App. 3a-4a (collecting cases). The Law Court also rejected the petitioners' new argument on appeal that Maine had waived its sovereign immunity based on its conclusion that the Maine Legislature had enacted statutes that expressly exempt the State from overtime suits. Pet. App. 6a-7a (citing Me. Rev. Stat. Ann., tit. 26, §§ 663(10), 664(3) (West 1988 & Supp. 1998)).

## SUMMARY OF ARGUMENT

The petitioners seek to strip the State of Maine of one of the core attributes of sovereignty, namely, its immunity from a private damages action in its own courts. First, the petitioners contend that under the Supremacy Clause, Maine cannot assert a defense of "state sovereign immunity" in state court because Congress expressly authorized individuals to sue States in state court under the Fair Labor Standards Act ("FLSA"). Second, the petitioners contend that Maine cannot "discriminate" against a private damages action under the FLSA because Maine has waived its sovereign immunity in state court against certain other types of damages claims. The petitioners' conclusions are not only wrong, but their approach fundamentally misconceives the analysis necessary to resolve the important federalism issues presented in this case. We consider each argument in turn.

**Congressional Abrogation.** The petitioners never seriously confront, much less answer, the fundamental question in this case – what is the source of Congress' power to abrogate Maine's sovereign immunity in its own courts? To answer this question, we must return to first principles and consider the historical evidence largely ignored by the petitioners.

It is beyond dispute that prior to the adoption of the Constitution, States were immune from private damages action in state court without their consent. During the debate concerning the ratification of the Constitution, even the most ardent federalists disclaimed any power under the Constitution to subject unwilling States to private damage actions.

There likewise is nothing in the plan of the convention that compels the conclusion States surrendered this

basic attribute of sovereign immunity when they ratified the Constitution. It should not be forgotten that the Constitution created a federal government of limited powers, and that the States and the people retained all powers not expressly or necessarily delegated to the federal government. The petitioners do not even cite the Tenth Amendment, much less consider its pivotal significance in this case.

Although the Constitution grants Congress the power to regulate commerce among the States, that does not begin to prove Congress has the power to abrogate a State's immunity from private damage actions when it acts pursuant to its Commerce Clause powers. The petitioners' contrary assumption that federalism does not place any limits on Congress' Commerce Clause powers cannot be squared with the historical record or with this Court's recent decisions interpreting the Commerce Clause, the Tenth Amendment, and the Eleventh Amendment. In brief, nearly 200 years of this Court's federalism jurisprudence converge on the same conclusion: "The principle is elementary that a State cannot be sued in its own courts without its consent. This is a privilege of sovereignty." *Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1879).

The petitioners contend that under the Supremacy Clause, federal law trumps any contrary state law. This is true, of course, when the federal law is valid. This argument, however, begs the fundamental question whether Congress' abrogation of sovereign immunity in state court under the FLSA is valid. We contend that the principles of federalism embodied in the history, structure, and language of the Constitution ineluctably leads to the conclusion that this federal law is not valid.

**Discrimination.** The petitioners contend that Maine has "discriminated" against a private cause of action under the FLSA in state court because it has agreed to hear "analogous" claims in state court. As a threshold matter, the Court should not review this matter because the petitioners did not adequately raise this issue below, and Maine's courts did not address this claim.

Maine has not discriminated against a federal overtime claim because the most analogous state claim is Maine's state overtime statute, and Maine is expressly exempt under that statute. Me. Rev. Stat. Ann., tit. 26, §§ 663(10), 664(3) (West 1988 & Supp. 1998). The petitioners' suggestion that the Court should not consider the most analogous state statute, but simply consider whether the State has waived its immunity for any damage claims by state employees, would subject States to any and all federal claims regardless of Congress' authority to abrogate a State's sovereign immunity. It would also create the perverse result of encouraging States to close their doors to all state claims for fear of creating unknown and unlimited federal liability.

Moreover, this search for "analogous" state statutes is fundamentally misconceived when Congress lacks the authority to abrogate Maine's sovereign immunity and there is not a scintilla of evidence to suggest that Maine is opposed to the policies animating the FLSA. It is simply not discrimination for a State to decide when it will consent to suit and, on what terms it will consent to suit, if Congress does not have the power to require a State to entertain a lawsuit against itself in its own courts.

## ARGUMENT

### I. CONGRESS LACKS AUTHORITY UNDER THE COMMERCE CLAUSE TO ABROGATE A STATE'S SOVEREIGN IMMUNITY FROM A PRIVATE DAMAGES ACTION IN STATE COURT.

#### A. The Narrow Issue Presented Is Not Congress' Power To Enact The FLSA Or Its Intention To Abrogate A State's Sovereign Immunity In State Court, But Rather Its Authority To Abrogate Such Immunity In State Court.

In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), the Court held that Congress lacks the authority under the Commerce Clause to abrogate a State's immunity from suit in federal court under the Eleventh Amendment. The petitioners do not challenge the conclusion that the Fair Labor Standards Act ("FLSA") was passed pursuant to the Commerce Clause, and thus, although the FLSA expressly permits private damages actions in state and federal court, 29 U.S.C. § 216(b), Congress lacks authority to abrogate Maine's immunity from suit under the FLSA in federal court. *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997). The issue in this case is not Congress' *intention* to abrogate Maine's sovereign immunity, but rather its *power* to do so. See *Seminole Tribe*, 517 U.S. at 55. Stated differently, the central question in this case is whether Congress congruently lacks authority to abrogate Maine's immunity from suit under the FLSA in state court.

The answer to this question has been foreshadowed by this Court's recent decisions concerning the scope of the Eleventh Amendment, and the consequence of concluding that private individuals cannot sue States in federal court: "The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present

them, if the State permits, in the State's own tribunals." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) (emphasis added). Likewise, in rejecting the argument that States could ignore applicable federal law if Congress did not have authority to abrogate state sovereign immunity, the *Seminole Tribe* Court observed:

This argument wholly disregards other methods of ensuring the States' compliance with federal law: the Federal Government can bring suit in federal court against a State; an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law; and this Court is empowered to review a question of federal law arising from a state court decision *where a State has consented to suit*.

*Seminole Tribe*, 517 U.S. at 71 n.14 (citations omitted and emphasis added). Significantly, the Court did *not* state that Congress had authority under the Commerce Clause to abrogate a State's sovereign immunity from private suits for damages in its own courts.

Before turning to the dispositive issue in this matter, we emphasize the limited scope of Maine's sovereign immunity argument. *First*, we need not argue that Congress' power to regulate commerce "among the several States," U.S. Const. art. I, § 8, cl. 3, does not extend to Maine's noncommercial activity of paying its probation officers wages for performing services for the State of Maine in the State of Maine. See *United States v. Lopez*, 514 U.S. 549 (1995).

*Second*, it is also unnecessary to revisit the conclusion that the substantive requirements of the Fair Labor Standards Act can constitutionally be applied to the States without infringing upon the State's sovereignty under the Tenth Amendment. See *Garcia v. San Antonio Metropolitan*

*Transit Authority*, 469 U.S. 528 (1985). We simply note that this case underscores the hazards of shoehorning the traditional and essential functions of government into the rigid requirements of the FLSA, which were enacted to regulate private enterprise. The State's creative attempt to provide important governmental services and to fairly compensate probation officers for providing such services by paying them a 16% non-standard premium in lieu of overtime was stymied by the FLSA straitjacket. See *Blackie v. Maine*, 75 F.3d 716, 724-25 & n.7 (1st Cir. 1996).

Although the *Garcia* Court "perceive[d] nothing in the overtime and minimum-wage requirements of the FLSA \* \* \* that is destructive of state sovereignty or violative of any constitutional provision[.]" 469 U.S. at 554, that does not resolve the issue whether subjecting States to private damage actions based on such requirements is, in fact, destructive of state sovereignty or violative of any constitutional provision. See *Seminole Tribe*, 517 U.S. at 71 (Congress' substantive Commerce Clause law-making authority distinguished from Congress' abrogation authority under the Commerce Clause). Thus, the petitioners' repeated reliance on *Garcia* in this case is misplaced. See Private Petitioners' Brief at 7, 12-13; Federal Petitioners' Brief at 3, 12-14, 25, 43. Simply stated, Maine need not be immune from the substantive requirements of the FLSA to be immune from private damage actions under the FLSA.

*Third*, we do not question the authority of the United States to sue the State for damages. See *Seminole Tribe*, 517 U.S. at 71 n.14; *United States v. Texas*, 143 U.S. 621, 644-45 (1892). The United States Secretary of Labor ("Secretary") is specifically authorized under the FLSA to file suit seeking damages, 29 U.S.C. § 216(c). Although the federal petitioners acknowledge this alternative, they argue that

it is unsatisfactory because the Secretary is overworked and lacks the resources to bring FLSA actions against States. See Federal Petitioners' Brief at 37-38. They argue that "[t]he Constitution should not be construed to require that Congress leave vindication" of rights under the FLSA "to either the discretion of the State that owes the wages or the discretion of federal officials who must operate under their own enforcement priorities and resource limitations." *Id.* at 38. The short answer is that the Constitution should not be construed simply to ease the administrative burdens on the federal government.

Fourth, we do not question the availability of prospective injunctive relief in appropriate cases. The Secretary is specifically authorized under the FLSA to file suit seeking injunctive relief, 29 U.S.C. § 217. The federal petitioners' administrative burden argument is no more persuasive here than before. Moreover, the petitioners do not – and cannot – dispute that an injunction is inappropriate in this case because Maine has complied with the substantive requirements of the FLSA since 1994 by paying overtime to its probation officers. See, e.g., Federal Petitioners' Brief at 6; Pet. App. 15a-16a.

Furthermore, under *Ex parte Young*, 209 U.S. 123 (1908), in cases in which there is not a detailed remedial scheme for enforcement against a State of a statutorily created right, private individuals can seek prospective injunctive relief against state officials to end a continuing violation of federal law. See *Seminole Tribe*, 517 U.S. at 73-76. The federal petitioners contend that this relief is "illusory" because, under the FLSA, only the Secretary can bring an injunctive action. See Federal Petitioners' Brief at 38. Even if that is true as a matter of statutory interpretation, that is of no more consequence to the constitutional issue in this case than the fact that such

prospective injunctive relief was also unavailable in *Seminole Tribe*. See 517 U.S. at 73-76.

Fifth, we do not question Congress' authority to abrogate Maine's sovereign immunity in either state or federal court when it validly enacts legislation pursuant to its express powers under section 5 of the Fourteenth Amendment. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); cf. *Boerne v. Flores*, 521 U.S. 507 (1997) (legislation must "enforce" Fourteenth Amendment in order to be valid). Since the vast majority of federal statutes that abrogate the States' sovereign immunity from private damage claims in state and federal court, and certainly the most significant statutes, such as the Federal Civil Rights Act, 42 U.S.C. § 1983, were passed pursuant to Congress' express authority under section 5, the implication that Maine is seeking to exempt itself from a broad swath of federal private damage actions is unwarranted. In any event, this acknowledgement does not make a difference in this case because the petitioners do not challenge the conclusion that the FLSA was passed solely pursuant to Congress' Commerce Clause, not Fourteenth Amendment, powers. See *Mills v. Maine*, 118 F.3d 37, 42-49 (1st Cir. 1997); Private Petitioners' Brief at 6, 22-23; Federal Petitioners' Brief at 10, 29-30.

The petitioners' rhetoric notwithstanding, Maine's sovereign immunity argument is, therefore, quite limited. We need not argue in this case that Maine's sovereign immunity precludes Congress from applying the substantive requirements of the FLSA to Maine, that Maine's sovereign immunity precludes the federal government from suing the State for damages under the FLSA, or that Maine's sovereign immunity precludes the federal government (or, if the FLSA were amended, private

individuals) from suing the State or state officials for prospective injunctive relief under the FLSA.

We now turn to the dispositive issue in this case. The answer to the question whether Congress lacks the authority to abrogate a State's sovereign immunity in state court "must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court." *Printz v. United States*, 521 U.S. 898, 905 (1997). We consider each source in turn.

**B. States Were Immune From Private Damage Actions In Their Own Courts Prior To The Adoption Of The Constitution.**

The petitioners' theorem is that the Constitution necessarily authorized Congress to abrogate a State's sovereign immunity in state court. Before evaluating the axioms of that hypothesis, we set the stage and consider the extent to which States were immune from private damage actions without their consent in their own courts prior to the adoption of the Constitution.

The private petitioners do not mine this historical bedrock. On the other hand, the federal petitioners acknowledge that "[b]efore the Constitution was adopted, there was an established common-law principle that a State could not be sued in its own courts without its consent." Federal Petitioners' Brief at 29 (citing *Nevada v. Hall*, 440 U.S. 410, 414-16 (1979)).

Indeed, it is beyond dispute that at the time of the adoption of the Constitution, States were immune from suit from their own citizens in their own courts. "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly

necessary to be formally asserted." *Hans v. Louisiana*, 134 U.S. 1, 16 (1890).

The immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity.

*Nevada v. Hall*, 440 U.S. at 414.

Under these circumstances, we find puzzling the private petitioners' assertion that *Nevada v. Hall* provides the "strongest support" for their position. Private Petitioners' Brief at 28; see also Federal Petitioners' Brief at 10 (*Nevada v. Hall* "firmly support[s]" petitioners' position). In that case, the Court was required to choose between assertions of sovereignty by two States – Nevada, which had immunized its employees against tort claims, and California, which had established tort liability for persons injured on California's highways and had created courts to adjudicate such tort liability. Although the Court readily accepted the conclusion that the principles of sovereign immunity "support[ ] the conclusion that no sovereign may be sued in its own courts without its consent," *Nevada v. Hall*, 440 U.S. at 416, those principles "afford[ ] no support for a claim of immunity in another sovereign's courts." *Id.*

The Court thus held that Nevada's sovereign immunity in another sovereign State's courts was solely a matter of comity when its employees crossed its sovereign borders. *Id.* at 425-26. Nevada took California's tort laws and courts as it found them when it permitted its employees to drive in California. The Court concluded that the Tenth Amendment precluded Nevada from placing restrictions on California's state sovereignty expressed through its tort laws and its courts:

[I]n view of the Tenth Amendment's reminder that powers not delegated to the Federal Government nor prohibited to the States are reserved to the States or to the people, the existence of express limitations on state sovereignty may equally imply that caution should be exercised before concluding that unstated limitations on state power were intended by the Framers.

*Id.* at 425 (footnote omitted). Far from supporting the petitioners' position, *Nevada v. Hall* reinforces the conclusion that States have been immune from suit in their own courts since time immemorial.

In evaluating the historical record, we also rely on the dissenting opinion of Justice Iredell in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which is entitled to substantial respect since his views were enshrined in the Eleventh Amendment, which was enacted to overturn the decision in *Chisholm v. Georgia*. See *Hans v. Louisiana*, 134 U.S. at 12. Justice Iredell stated without contradiction that "there is no doubt that neither in the State now in question, nor in any other [State] in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being either when the Constitution was adopted, or at the time the judicial act was passed." *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 434-435 (Iredell, J., dissenting) (emphasis omitted, brackets added, and spelling modernized); accord *id.* at 452 (Blair, J.) (agreeing that States could not be sued in their own courts when the Constitution was adopted).

In reaching this conclusion, Justice Iredell relied not only on the experience in Colonial America, but also on the long-standing tradition in England in which the sovereign could not be sued without his consent. *Id.* at 437-46

(Iredell, J., dissenting). Indeed, one of the cited examples is a case in which a worker could only petition, but not sue, the Crown for unpaid wages. *Id.* at 440 (Iredell, J., dissenting). Since there is no doubt that States were immune from suit in their own courts at the time of the adoption of the Constitution, we now consider whether the Constitution altered that conclusion.

**C. The Structure Of The Constitution And The Tenth Amendment Confirm That Congress Does Not Have Authority To Abrogate A State's Sovereign Immunity In State Court Under The Commerce Clause.**

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting *The Federalist* No. 39, at 245 (J. Madison) (C. Rossiter ed. 1961)). The essence of federalism is that States retained their sovereignty except to the extent it necessarily was ceded to the federal government. As Justice Story, writing for the Court, explained:

The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had a right to modify and restrain them, according to their own views of policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remain unaltered and unimpaired, except so far

as they were granted to the government of the United States.

*Martin v. Hunter's Lessee*, 16 U.S. (1 Wheat.) 304, 325 (1816).

In evaluating whether States surrendered their immunity from suit in their own courts in ratifying the Constitution, we begin with first principles. "The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. at 457; accord *United States v. Lopez*, 514 U.S. 549, 552 (1995). This limitation on the power of the federal government is reinforced by the Tenth Amendment, which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite. \* \* \* The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

*Gregory v. Ashcroft*, 501 U.S. at 457-58 (ellipsis added by Court) (quoting *The Federalist* No. 45, at 292-93 (J. Madison) (C. Rossiter ed. 1961)). We must therefore determine whether abrogation of a State's sovereign immunity in its own courts is one of the "few and defined" powers delegated to the federal government, *id.*, or whether it instead is "an incident of state sovereignty [that] is protected by a limitation on an Article I power." *New York v. United States*, 505 U.S. 144, 157 (1992) (brackets added).

In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in these cases as one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment.

*Id.* at 159. We consider first the Framers' views that sovereign immunity constitutes the core of sovereignty unaffected by the Constitution, and then consider whether the two constitutional provisions identified by the petitioners, namely, the Supremacy Clause and the Commerce Clause, alter that calculus.

# 1. The Framers Did Not Believe The Constitution Abrogated A State's Sovereign Immunity In State Court.

In interpreting the Constitution, we rely on the Framers' views, which the Court has "usually regarded as indicative of the original understanding of the Constitution." *Printz v. United States*, 521 U.S. 898, 910 (1997). There is no doubt the Framers believed that States were immune from suit in their own courts without their consent, and that the Constitution did not change that conclusion.

The Court has long relied upon the vigorous views of Alexander Hamilton, who was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution." *Id.* at 915-16 n.9 (quoting C. Rossiter, *Alexander Hamilton and the Constitution*, 199 (1964)). Notwithstanding his nationalistic views, Hamilton made plain that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *The Federalist* No. 81, at 506

(A. Hamilton) (C. Rossiter ed. 1961) (quoted in *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996); *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). Not only was State sovereign immunity inherent in the concept of sovereignty, but Hamilton emphatically argued that it was unaffected by the adoption of the Constitution:

This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal. \* \* \* [T]here is no color to pretend that the state governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961) (ellipsis added) (quoted in *Monaco v. Mississippi*, 292 U.S. 313, 324 (1934); *Hans v. Louisiana*, 134 U.S. at 13). Likewise, future Chief Justice Marshall argued that “[i]t is not rational to suppose that the sovereign power should be dragged before a court.” 3 J. Elliott, *Debates on the Federal Constitution*, 555 (2d ed. 1836) (quoted in *Hans v. Louisiana*, 134 U.S. at 14). James Madison similarly observed that “[i]t is not in the power of individuals to call any state into court.” 3 J. Elliott, *supra*, 533 (quoted in *Seminole Tribe*, 517 U.S. at 70 n.12).

The federal petitioners ignore the ratification debate altogether, and the private petitioners dismiss this debate in a footnote on the grounds that the ratification debate only concerned the extent to which the Constitution granted federal courts jurisdiction to hear cases against

States. See Private Petitioners’ Brief at 24-25 n.9. The Framers’ views are not so easily swept under the rug.

First, the Framers’ views quoted above are not limited to federal court jurisdiction, but rather proceed from the premise that States cannot be sued in any court – state or federal – without their consent. See also *Seminole Tribe*, 517 U.S. at 70 n.12 (criticizing the dissent’s similar reading of the ratification debates as “selective[ ]”). Second, the debate over the scope of federal jurisdiction only makes sense if the Framers believed that States could not be sued in their own courts, and therefore, the only open issue was whether the Constitution created a new federal forum in which States could be sued without their consent.

In this regard, it should not be forgotten that under the Madisonian Compromise, the Constitution only created the Supreme Court, and simply permitted Congress, at its option, to create lower federal courts. See *Printz*, 521 U.S. at 907. Thus, it was obvious that the federal government was going to rely on the numerous existing state courts, instead of the handful of federal courts that Congress might or might not create. Like Sherlock Holmes’ dog that failed to bark, it is significant that no one – Federalist or Anti-Federalist – ever suggested that the Constitution empowered Congress to abrogate a State’s sovereign immunity in its own courts. Since “[t]he Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself[.]” *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239 n.2 (1985), it is readily apparent that neither the Federalists nor the Anti-Federalists believed that the Constitution *sub silentio* authorized Congress to abrogate a State’s sovereign immunity in state court. We now

consider the constitutional provisions that the petitioners apparently believe the Framers overlooked.

## 2. The Supremacy Clause Did Not Abrogate A State's Sovereign Immunity In State Court.

The petitioners contend that this case is only about the Supremacy Clause, which provides:

This Constitution, and the Laws of the United States which shall be made In Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2. Indeed, the petitioners put their thumb on the scale by framing the question presented as "[w]hether the Supremacy Clause \* \* \* requires a state court to entertain a [FLSA] claim brought by a state employee against a state employer \* \* \* notwithstanding a state-law defense of sovereign immunity." Federal Petitioners' Brief at i (emphasis and ellipses added); accord Private Petitioners' Brief at i. The petitioners' argument is expressly premised on the contention that Maine's sovereign immunity in its own courts is exclusively the product of state law. See Private Petitioners' Brief at 22-23.

This, of course, is not Maine's argument. We readily agree that state laws must yield to constitutionally valid federal laws. We contend, however, that under the Constitution, Congress cannot validly abrogate Maine's sovereign immunity in state court acting pursuant to its Commerce Clause powers. Thus, Maine is neither relying simply on a state-law defense of sovereign immunity nor conceding that Congress validly passed section 16(b) of the FLSA, 29 U.S.C. § 216(b), which attempts to subject

Maine to private damage actions in both state and federal court.

The Supremacy Clause certainly does not answer the question whether Congress has authority to abrogate Maine's sovereign immunity:

The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereign immunity and are thus not in accord with the Constitution.

*Printz v. United States*, 521 U.S. 898, 924-25 (1997) (brackets added by Court); see also *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States."). Accordingly, when a law enacted pursuant to the Commerce Clause violates the principle of State sovereignty, it is not a proper law enacted pursuant to the Commerce Clause, and is thus in the words of *The Federalist*, "merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'" *Printz*, 521 U.S. at 923-24 (brackets added by Court) (quoting *The Federalist* No. 33, at 204 (A. Hamilton) (C. Rossiter ed. 1961)). In other words, the Supremacy Clause makes valid federal laws the supreme law of the land, but it does not make federal laws valid.

The petitioners are certainly wrong, therefore, in their assertion that when Congress provides for a federal claim to be heard in state court, the state courts are necessarily obligated to hear that claim under the Supremacy Clause. See Federal Petitioners' Brief at 17-18; Private Petitioners' Brief at 14-15. "The fact that Congress grants jurisdiction to hear a claim does not suffice to show

Congress has abrogated all defenses to that claim." *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 787 n.4 (1991) (emphasis in original).

In this regard, the petitioners detach from its moorings this Court's observation that "the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power." *Printz*, 521 U.S. at 907 (emphasis altered) (quoted in Private Petitioners' Brief at 15; Federal Petitioners' Brief at 18). This observation stands for the unremarkable proposition that state judges, like federal judges, must enforce valid federal laws, and it does not resolve the issue whether abrogation is a "matter[ ] appropriate for the judicial power" under the Constitution.

Since the petitioners do not dispute that Congress lacks the authority to abrogate Maine's sovereign immunity from a private damages action in federal court under the FLSA, the petitioners seek the anomalous result in which state courts are the only forum for private enforcement of a federal statutory right. This total reliance on state court judges not simply to apply federal law, but to carry out the administration of a federal statute through private enforcement actions, raises the specter of the federal government improperly "commandeering" the States. See, e.g., *New York v. United States*, 505 U.S. at 161.

In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States. As we have seen, the Court has consistently respected this choice. We have always understood that even where Congress has the authority under the

Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

*Id.* at 166 (citations omitted) (quoted in part in *Printz*, 521 U.S. at 924).

This concern should not be limited to the State's executive and legislature branches. Chief Justice Marshall, writing for the Court, generally warned against requiring the federal government to rely on the States to carry out its objectives:

No trace is to be found in the constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends.

*McCulloch v. Maryland*, 19 U.S. (4 Wheat.) 316, 424 (1819) (emphasis added). Indeed, in explaining why the Court must interpret its Article III jurisdiction expansively, Chief Justice Marshall, writing for the Court, explained that Congress could not be forced to rely on state courts because they were "tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States." *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 821 (1824). In sum, this Court's "commandeering" jurisprudence, culminating in *Printz*, undermines, not undergirds, the petitioners' attempt to establish state courts as the sole forum for private enforcement of a federal statute against a State.

Since the Supremacy Clause simply requires courts to enforce valid federal laws over contrary state laws, it is pellucidly plain that the petitioners' primary authority, *Howlett v. Rose*, 496 U.S. 356 (1990), is inapposite. In that case, the issue was "whether a state-law defense of 'sovereign immunity' is available to a school board otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum." *Id.* at 359. The issue here is precisely the opposite – should the State have available a federal defense of sovereign immunity in state court that was available when the action was brought in a federal forum?

Florida had attempted to immunize a local school board under state law from liability under 42 U.S.C. § 1983. *Howlett* obviously did not involve a State defendant, and more importantly, the Court had previously ruled that, as a matter of federal law, municipalities and similar governmental entities were "persons" subject to liability under section 1983. See *Howlett v. Rose*, 496 U.S. at 376; *Monell v. New York City Department of Social Services*, 436 U.S. 658, 663 (1978). Furthermore, no one disputed – and no one could dispute – that Congress had authority to abrogate a school board's sovereign immunity pursuant to section 1983. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Indeed, as the *Seminole Tribe* Court noted, the express grant of power to Congress vis-à-vis States under section 5 of the Fourteenth Amendment stands in sharp contrast to the conspicuous absence of the grant of such power under the Commerce Clause. See *Seminole Tribe*, 517 U.S. at 59. Under these circumstances, the result in *Howlett* was foreordained, and irrelevant to the present inquiry.

The petitioners' Supremacy Clause argument could also render *Ex parte Young*, 209 U.S. 123 (1908), largely superfluous. Since the *Ex parte Young* exception for prospective declaratory and injunctive relief in federal court against state officials may be limited to circumstances in which "there is no state forum available to vindicate federal interests," *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 270 (1997) (Opinion of Kennedy, J.), it is relevant that the petitioners believe a state forum should always be available for the "effective vindication of rights guaranteed by federal law[.]" Federal Petitioners' Brief at 40. This is not the law. The Supremacy Clause does not give Congress the authority to abrogate a State's sovereign immunity, but simply enforces that authority if it is contained elsewhere in the Constitution.

### 3. The Commerce Clause Did Not Abrogate A State's Sovereign Immunity In State Court.

The petitioners treat it as self-evident that Congress has authority under the Commerce Clause to abrogate a State's sovereign immunity in state court. The Commerce Clause provides that "[t]he Congress shall have the Power \* \* \* To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Quite simply, as the *Seminole Tribe* Court made clear under the Eleventh Amendment, the power to regulate commerce "among the several States" does not expressly or necessarily give Congress the power to abrogate a State's sovereign immunity.

The federal petitioners argue without citation that the States necessarily surrendered their immunity from suit in state court when they agreed to give Congress the power to regulate commerce among the several States. See Federal Petitioners' Brief at 29-30. The private petitioners

go even further, arguing without citation that not only did Congress necessarily obtain the power to abrogate a State's sovereign immunity under the Commerce Clause, but it is incumbent upon the States to prove clearly that such authority was not given to Congress. *See* Private Petitioners' Brief at 23.

The petitioners' belief that there are no limits on Congress' exercise of its enumerated powers cannot be reconciled with this Court's federalism decisions interpreting the Commerce Clause, *United States v. Lopez*, 514 U.S. 549 (1995), the Tenth Amendment, *Printz v. United States*, 521 U.S. 898 (1997), and the Eleventh Amendment, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). In contrast to the petitioners' constitutional construct, "Congress' authority is limited to those powers enumerated in the Constitution, and \* \* \* those enumerated powers are interpreted as having judicially enforceable outer limits[.]" *United States v. Lopez*, 514 U.S. at 566 (emphasis and ellipsis added and citation omitted).

Th[e] [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it \* \* \* is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.

*Id.* (brackets and ellipsis added by Court) (quoting *McCulloch v. Maryland*, 19 U.S. (4 Wheat.) 316, 405 (1819) (Marshall, C.J.)). As Chief Justice Marshall explained 180 years ago, the issue is not whether Congress acted pursuant to the Commerce Clause, but rather whether Congress acted pursuant to "the extent of the powers actually granted" pursuant to the Commerce Clause. *Id.* Thus, the

naked assertion that the States surrendered their sovereignty in their own courts simply because Congress enacted the Fair Labor Standards Act pursuant to the Commerce Clause is *ipse dixit* which is contrary to nearly 200 years of federalism decisions from this Court.

The petitioners' further assertion that it is incumbent upon the States to prove that the power of abrogation under the Commerce Clause was *not* delegated to Congress is contrary to the structure of the Constitution in which the federal government was granted only limited, enumerated powers. As Justice Story, writing for the Court, explained: "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication." *Martin v. Hunter's Lessee*, 16 U.S. (1 Wheat.) at 326.

Thus, the burden is on the petitioners to produce "compelling evidence" that the Framers thought that States had surrendered their immunity from suit in their own courts when they granted Congress power to regulate commerce among the States. *Blatchford v. Native Village of Noatak*, 501 U.S. at 781 (footnote omitted). The petitioners do not produce any evidence, much less compelling evidence, to prove that there had been a "surrender of this immunity in the plan of the convention" when the Commerce Clause was adopted. *See* The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961); *Monaco v. Mississippi*, 292 U.S. at 324; *Hans v. Louisiana*, 134 U.S. at 13.

In this regard, it is relevant whether Congress attempted to use the significant, and presumably attractive, power the petitioners believe it received under the Commerce Clause, namely, the power to abrogate a

State's sovereign immunity in its own courts. *See Printz*, 521 U.S. at 907-10. Our research failed to disclose any early examples of Congress exercising this vast power over the States. *See also United States v. Lopez*, 514 U.S. at 568 ("for almost a century after adoption of the Constitution, the Court's Commerce Clause decisions did not concern the authority of Congress to legislate") (Kennedy, J., concurring).

The petitioners presumably do not attempt the Sisyphean task of proving that Congress' power to regulate commerce among the several States necessarily includes the power to abrogate a State's sovereign immunity from private damage actions because this Court concluded no such power existed just two Terms ago in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Although the petitioners are certainly correct that the Court was only deciding whether Congress had the power to abrogate a State's sovereign immunity in federal court, the Court did not reach its decision in a vacuum. Throughout its opinion, the Court broadly framed the question as whether Congress had the power under the Commerce Clause "to abrogate the States' sovereign immunity," *id.* at 58 (emphasis added), not the more limited question whether Congress had the power to abrogate the States' Eleventh Amendment immunity in federal court. *See generally id.* at 67-73 (discussing issue as relating to "state sovereign immunity" generally, not just immunity from suit in federal court).

After surveying nearly 200 years of decisions that came to this Court from both state and federal court, the Court concluded that States did not surrender their sovereign immunity exemplified in the Eleventh Amendment in the plan of the convention when the Commerce Clause was adopted as part of the Constitution:

In overruling [*Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality opinion)], today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.

*Seminole Tribe*, 517 U.S. at 72 (footnote omitted). Since the Eleventh Amendment is simply the "embodi[ment]" of the "background principle of state sovereign immunity," there is no principled basis upon which to distinguish congressional authorization of suits by private parties against unconsenting States in state court from such suits in federal court. *Id.* In sum, the petitioners do not – and cannot – produce compelling evidence that the States necessarily surrendered their immunity from suit without their consent in their own courts when they granted Congress the power to regulate commerce among the several States.

**D. The Principles Of The Eleventh Amendment Confirm That Congress Does Not Have Authority To Abrogate A State's Sovereign Immunity In State Court Under The Commerce Clause.**

We have now demonstrated it was universally agreed that States were immune from suit in their own courts without their consent at the time of adoption of the Constitution, and that the Framers – and everyone else, for that matter – apparently believed that the Constitution did not alter that delicate balance. In contrast to the

heated debates over the scope of federal court jurisdiction under Article III, no one suggested that the Constitution granted Congress the power to abrogate a State's immunity in state court. Under the Tenth Amendment, therefore, the petitioners' claims must be rejected. We submit, furthermore, that the principles animating the Eleventh Amendment, as interpreted by this Court, cements that conclusion.

In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Court concluded that Article III of the Constitution altered the balance of power between the Federal Government and States by authorizing suits against States in federal court. That decision, however, created such a "shock of surprise" that it was immediately overruled by the Eleventh Amendment. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890); accord *Seminole Tribe*, 517 U.S. 44, 69 (1996). The Eleventh Amendment provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Eleventh Amendment was designed to reaffirm the traditional notion of State sovereign immunity by eliminating the only extant exception to that immunity, *Chisholm v. Georgia*. Thus, the Eleventh Amendment "did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits." *Hans v. Louisiana*, 134 U.S. at 11.

Although the petitioners are correct in their assertion that the Eleventh Amendment, by its terms, does not apply in state court, that misses the point. The Court has made plain that "blind reliance upon the text of the

Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.' " *Seminole Tribe*, 517 U.S. at 69 (quoting *Monaco v. Mississippi*, 292 U.S. 313, 326 (1934); *Hans v. Louisiana*, 134 U.S. at 15). Indeed, the Eleventh Amendment "stand[s] not so much for what it says, but for the presupposition \* \* \* which it confirms." *Seminole Tribe*, 517 U.S. at 54 (ellipsis added by Court) (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).

That presupposition [of State sovereign immunity], first observed over a century ago in *Hans v. Louisiana*, 134 U.S. 1 (1890), has two parts: first, that each State is a sovereign entity in our federal system; and second, that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." "

*Seminole Tribe*, 517 U.S. at 54 (emphasis deleted by the Court) (quoting *Hans v. Louisiana*, 134 U.S. at 13; The Federalist No. 81, at 506 (A. Hamilton) (C. Rossiter ed. 1961)). It therefore denigrates the importance of the Eleventh Amendment to simply treat it as a forum selection clause - States can "choose" to waive the immunity in federal court or they can be forced to hear such claims in state court. See Private Petitioners' Brief at 4, 26.

"For over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 67. In other words, the Eleventh Amendment is "but an exemplification" of the fundamental rule of sovereign immunity that "a State cannot be sued without its consent." *Ex parte New York*, 256 U.S. 490, 497 (1921) (quoted in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984)); see also *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 267-68 (1997)

(Eleventh Amendment is "evidenc[e]" and "exemplifi[cation]" of "broader concept of immunity implicit in the Constitution") (citation omitted).

Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

*Monaco v. Mississippi*, 292 U.S. at 322-23 (citation and footnote omitted) (quoted in *Seminole Tribe*, 517 U.S. at 68). Thus, we rely on the principles, not just the language, of the Eleventh Amendment, to determine whether a State's sovereignty is offended by federal legislation. See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) (relying on "essential postulate[s]" under Eleventh Amendment in *Monaco* to address Tenth Amendment challenge); see also *id.* at 923-24 n.13 (Court may rely on "implication" as well as constitutional text to resolve federalism issues).

Throughout our history, the Court has understood the Eleventh Amendment to confirm the broader proposition that States are generally immune from suit without their consent:

*It may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as a defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.*

*Cunningham v. Macon & Brunswick Railroad*, 109 U.S. 446, 451 (1884) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17). "A State, without its consent, cannot be sued by an individual[.]" *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1875).

The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. \* \* \* To secure the manifest purposes of the constitutional exemption guaranteed by the 11th Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectively to accomplish the substance of its purpose.

*In re Ayers*, 123 U.S. 443, 505-506 (1887). In other words, "[t]he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Seminole Tribe*, 517 U.S. at 54 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

The private petitioners ignore this rich historical tradition, while the federal petitioners dismiss a couple of these cases as immaterial *dicta* on the grounds that the issue before the Court was federal court jurisdiction in the face of the Eleventh Amendment. See Federal Petitioners' Brief at 35-36. Although that was the issue in the above-quoted cases, that does not assist the petitioners because the Court was considering whether the Eleventh Amendment should be interpreted broadly in federal court against a backdrop in which the States were immune from suit in their own courts. For example, in *Hans v. Louisiana*, 134 U.S. 1 (1890), the case was only filed

in federal court because “[t]he state courts have no power to entertain suits by individuals against a State without its consent[.]” and the Court was concerned about the need for symmetry in federal court. *Id.* at 18.

Furthermore, in numerous cases that came to this Court from state courts, the Court either considered the principles of sovereign immunity exemplified in the Eleventh Amendment, or broadly opined that States were immune from suit in their own courts. “No sovereign State is liable to be sued without her consent.” *Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1838) (quoted in *Hans v. Louisiana*, 134 U.S. at 16).

*It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State.*

*Beers v. Alabama*, 61 U.S. (20 How.) 527, 529 (1858) (emphasis added) (quoted in *Hans v. Louisiana*, 134 U.S. at 17, and quoted in part in *Seminole Tribe*, 517 U.S. at 69).

The question we have to decide is not whether the State is liable for the debts of the bank to the railroad company, but whether it can be sued in its own courts to enforce that liability. *The principle is elementary that a State cannot be sued in its own courts without its consent.* This is a privilege of sovereignty.

*Railroad Co. v. Tennessee*, 101 U.S. 337, 339 (1879) (emphasis added) (quoted with approval in *Will v. Michigan Department of State Police*, 491 U.S. 58, 67 (1989)). Although not dispositive, this “oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment” reinforces the conclusion that the

Constitution did not grant Congress the power to abrogate a State’s sovereign immunity when it acts pursuant to its Commerce Clause powers. *Seminole Tribe*, 517 U.S. at 67.

In this case, all roads lead to Rome – the long historical tradition before the Constitution was adopted, the language and structure of the Constitution, including the Tenth Amendment, the ratification debates concerning the meaning of the Constitution, and the history and jurisprudence interpreting the Eleventh Amendment. Congress lacks the authority under the Commerce Clause to abrogate a State’s sovereign immunity in its own courts.

#### **E. The Petitioners’ Remaining Authorities Do Not Prove That Congress Has Authority To Abrogate A State’s Sovereign Immunity In State Court.**

In their attempt to prove that Congress has authority to abrogate Maine’s sovereign immunity in state court, the petitioners rely heavily on two cases that did not involve the Tenth Amendment, the Eleventh Amendment, or even principles of federalism. Neither case can support the weight of the petitioners’ argument.

In *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), the issue was not Congress’ power to abrogate a State’s sovereign immunity, but rather an issue of statutory construction, namely, whether Congress intended to create a cause of action under the Federal Employees’ Liability Act (“FELA”) against a state-owned railroad, which, in turn, could be enforced in state court. 502 U.S. at 199. Because the Court’s “analysis and ultimate determination in this case are controlled and informed by the central importance of *stare decisis* in this Court’s jurisprudence[.]” *id.* at 201, the Court refused to disturb the

conclusion in *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964), that state-owned railroads were subject to the requirements of the FELA. *Hilton*, 502 U.S. at 201-203. The Court noted that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Id.* at 202 (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989)).

*Hilton* did not concern Congress' power to abrogate a State's sovereign immunity. The Court had previously assumed that Congress *did* have the power under the Commerce Clause to abrogate a State's sovereign immunity in FELA actions, see *Welch v. Texas Department of Highways*, 483 U.S. 468, 475, 478 n.8 (1987) (plurality opinion), an assumption that is unfounded following *Seminole Tribe*. Furthermore, the State did not challenge the conclusion that Congress had power to abrogate its sovereign immunity. See Brief for *Hilton* Respondent, No. 90-848, at 2 ("The South Carolina Public Railways Commission assumes, but does not concede, that Congress has the Constitutional authority to subject it to the FELA.") (footnote omitted); *id.* at 7 n.14 ("Respondent has not raised sovereign immunity as an affirmative defense to an otherwise applicable cause of action[.]").

Finally, the Court recognized that outside the context of *stare decisis* and interpretation of a presumably valid statute, there are important federalism concerns that militate in favor of equal treatment of the State in both state and federal court:

The resulting symmetry, making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it. It also avoids the federalism-

related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute. This is not an inconsequential argument.

*Hilton*, 502 U.S. at 206. *Hilton*, therefore, provides no traction to the petitioners in their drive to force Maine's courts to entertain a private FLSA damages action against the State of Maine.

Relying on *Reich v. Collins*, 513 U.S. 106 (1994), the petitioners argue that the failure to afford the private petitioners a remedy in state court for violations of the FLSA "raises serious Fourteenth Amendment concerns." Private Petitioners' Brief at 32; see *id.* at 28-32; Federal Petitioners' Brief at 34. Although this claim is without merit, the Court should not even address it because this issue was not adequately raised or addressed below, and is not fairly included in the questions on which the Court granted certiorari. See *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

The private petitioners did not raise this issue in the trial court, Jt. App. 26-37, and, not surprisingly, the trial court did not address this novel theory, Pet. App. 14a-24a. On appeal to the Law Court, the private petitioners did not raise this claim as an issue on appeal, Jt. App. 62 and only mentioned a due process claim in passing, Jt. App. 71. Once again, the Law Court did not address this fleeting theory, Pet. App. 1a-13a. Finally, in the petition for a writ of certiorari, the private petitioners did not mention a due process claim in either the questions presented or in the petition itself. The Court should not address such a stealth claim.

In any event, the private petitioners concede that "the line of cases culminating in *Reich v. Collins* does not deal directly with the effect of state sovereign immunity

rules across the full range of federal causes of action against the State[.]” Private Petitioners’ Brief at 31. In fact, this line of cases appears to be limited to tax cases, and actually a subset of tax cases – cases in which the State held out the illusion of an adequate post-deprivation remedy, and then, after the taxes were paid, engaged in “bait-and-switch” by declaring no such remedy existed. See *Reich v. Collins*, 513 U.S. at 111.

*Reich* has nothing to do with congressional abrogation of a State’s sovereign immunity – it only concerns due process and the requirement that when the State takes a person’s property, it must provide adequate pre-deprivation or post-deprivation process. It makes no sense to transport this due process theory to cases in which the State created neither the property interest nor the process. Congress obviously cannot create a property right when it acts without power to create a remedy. Cf. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (property interests not created by Constitution, but by independent sources such as state law). Otherwise, every time Congress abrogated a State’s sovereign immunity without authority, thereby precluding recovery in federal court, it would create a “due process” right to a remedy in state court.

## II. IF CONGRESS LACKS AUTHORITY TO ABROGATE A STATE’S SOVEREIGN IMMUNITY, A STATE DOES NOT DISCRIMINATE BY DECLINING TO WAIVE ITS IMMUNITY IN STATE COURT.

The petitioners’ final arrow in their quiver is a claim that Maine has “discriminated” against a federal cause of action because Maine state courts hear “analogous” state law claims. See Private Petitioners’ Brief at 32-37; Federal

Petitioners’ Brief at 17-27. This also falls short of the target.

As an initial matter, we note that this case presents a poor vehicle for resolving this issue since Maine’s courts did not address this discrimination claim and the petitioners did not properly present this issue in state court.

With very rare exceptions, \* \* \* we will not consider a petitioner’s federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

*Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (citations omitted and ellipsis added) (dismissing writ as improvidently granted).

The private petitioners did not raise this issue in the trial court. Jt. App. 26-37. On appeal to the Law Court, the private petitioners raised for the first time a “waiver” argument and a “discrimination” argument, both of which were premised on allegedly “analogous” state statutes. Jt. App. 63-67, 71-77. Under Maine law, however, appellants cannot raise new issues on appeal:

No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.

*Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981) (citations omitted).

The Law Court did not address the petitioners’ discrimination argument, and rejected the factual premise of the petitioners’ waiver argument (which also dooms the petitioners’ discrimination argument). Pet. App. 6a-7a. The petitioners, therefore, seek review of an issue that Maine’s highest court did not address, either because it was procedurally barred or because it was without merit.

Even if the Court reaches the merits of this claim, it is unavailing because Maine has not violated "the non-discrimination principle crystallized in *Testa v. Katt*, 330 U.S. 386 (1947)[.]" Private Petitioners' Brief at 33. This principle only applies, however, in cases in which, *first*, Congress has validly passed a statute that commands compliance under the Supremacy Clause, *second*, the state court has refused to enforce the federal statute based on some policy disagreement, and *third*, the state court routinely hears similar cases under the most analogous state law. That is not this case.

The federal petitioners find the antecedent to the non-discrimination principle in *Clafin v. Houseman*, 93 U.S. 130 (1876). See Federal Petitioners' Brief at 18-19. In that case, the Court simply concluded that when Congress granted concurrent jurisdiction to the state courts under the Bankruptcy Act, a bankruptcy trustee could bring an action in state court when the state courts exercised jurisdiction under "like" laws. *Clafin*, 93 U.S. at 139. The case did not involve any federally-created rights – on the contrary, the trustee sought to bring the precise same cases permitted under state law, "common-law actions, ejectment, trespass, trover, assumpsit, debt, &c., or suits in equity[.]" *Id.* at 135. The *Clafin* Court repeatedly emphasized that the trustee could only bring such cases insofar as the state court's jurisdiction and the State's constitution permitted such actions. See *id.* at 136, 137, 141, 143. Finally, the Court repeated the long-held view that Congress could not "confer jurisdiction upon the State courts." *Id.* at 141 (citation omitted). *Clafin*, therefore, provides a shaky foundation for the petitioners' edifice.

The petitioners also rely heavily on *Mondou v. New York, New Haven & Hartford Railroad Co. (Second Employers'*

*Liability Case*), 223 U.S. 1 (1912), and *McKnett v. St. Louis & San Francisco Railway Co.*, 292 U.S. 230 (1934). See Private Petitioners' Brief at 33-34; Federal Petitioners' Brief at 19. In these cases, the Court concluded that an employee could bring a negligence action under the Federal Employees' Liability Act ("FELA") against a railroad in state court. The Court rejected the contention that Congress exceeded its powers in passing the FELA, and thus there was no issue about congressional authority to impose the FELA on the States. See *Mondou*, 223 U.S. at 46-55. Once again, although Congress had authorized the action, the underlying claim was not a federally-created right, but rather a run-of-the-mill negligence action that state courts routinely heard. *Id.* at 56-57.

The Court was careful to distinguish the FELA from an "attempt by Congress to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure[.]" *Id.* at 56. This is precisely what the petitioners seek in this case. One of the more pernicious aspects of the petitioners' discrimination argument is their contention that not only are state courts required to exercise jurisdiction over FLSA claims against States, but they are pre-empted from applying their own procedures to such claims. See Private Petitioners' Brief at 18-19 & n.7; Federal Petitioners' Brief at 22-24. Accordingly, States would be powerless to partially waive their immunity or to deviate in any respect from the procedures and substance of the FLSA. We fail to see how this approach would "further the State's interest in playing a role in interpreting the contours of federal law and integrating federal and state law into a single body of law governing the conduct of those within the State." Federal Petitioners' Brief at 41.

In rejecting the state courts' attempt to decline jurisdiction over private parties, the *Mondou* Court was clear that the courts' jurisdiction "could not be overcome by disagreement with the policy of the federal Act[.]" *Howlett v. Rose*, 496 U.S. 356, 373 (1990) (citing *Mondou*, 223 U.S. at 57), and that the courts could not decline jurisdiction "solely because the suit is brought under a federal statute." *McKnett*, 292 U.S. at 233-34. There is not a scintilla of evidence that the Maine courts refused to entertain the private petitioners' claims because of any disagreement with the policy of the FLSA. Cf. *Gordon v. Maine Central Railroad*, 657 A.2d 785 (Me. 1995) (in private action, relying on FLSA to explicate state overtime statute).

In the end, these cases do not assist the petitioners because they stand for the simple "proposition that a state court must entertain a claim arising under federal law 'when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws.'" *Printz v. United States*, 521 U.S. 898, 906 n.1 (1997) (quoting *Mondou*, 223 U.S. at 56-57). *Mondou* and *McKnett* thus bring us back to the fundamental issue in this litigation because a state court's ordinary jurisdiction does not extend to a claim in which the State is immune from suit. See, e.g., *Georgia Rail Road & Banking Co. v. Musgrove*, 335 U.S. 900 (1949) (*per curiam*) (cited with approval in *Howlett v. Rose*, 496 U.S. at 372).

This leaves the petitioners' principal authority in its discrimination argument, *Testa v. Katt*, 330 U.S. 386 (1947). As before, this case did not involve either a claim against a State or a challenge to Congress' authority to abrogate a State's sovereign immunity. On the contrary, the question was whether the Rhode Island Supreme Court could refuse to enforce a "valid penal law" against a car dealer

based on its policy disagreement with the New Deal legislation that authorized the suit. *Id.* at 389; see also *id.* at 394 ("Our question concerns only the right of a state to deny enforcement to claims growing out of a valid federal law."). Under the Supremacy Clause the answer to that question was obvious. See *id.* at 389 (quoting Supremacy Clause). Indeed, the fundamental premise of *Testa* and its progeny, is that "state courts cannot refuse to apply federal law[.]" *Printz*, 521 U.S. at 928. This, however, does not advance the petitioners' cause since the federal constitutional scheme precludes their FLSA damages claim against States in either federal or state court. Particularly since the Court reiterated that a state court — could decline jurisdiction when it had a "valid excuse," *Testa*, 330 U.S. at 392 (quoting *Douglas v. New York, New Haven & Hartford Railroad Co.*, 279 U.S. 377, 388 (1929)), it should be apparent that the state courts have a "valid excuse" when Congress lacks the authority to abrogate a State's sovereign immunity in state court.

In concluding that Rhode Island was discriminating against a federal cause of action, the Court emphasized that the state court had declined jurisdiction because of a policy disagreement with the federal statute, *Testa*, 330 U.S. at 388, and that "[i]t is conceded that this *same type* of claim arising under Rhode Island law would be enforced by that State's courts." *Id.* at 394 (emphasis added). Neither feature is present in this case.

We submit that the non-discrimination principle has no place in this litigation. The *Testa* line of cases does not involve States or congressional attempts to abrogate a State's sovereign immunity in its own courts. These cases either assume or expressly state that Congress has the authority to enact the federal statute authorizing the lawsuit in state court. Although pejoratively described as

"discrimination," when Congress lacks such authority, a State's decision whether or not to permit such a lawsuit is simply a decision concerning the extent to which it will consent to suit.

When Congress lacks the authority to abrogate a State's sovereign immunity in its own courts, the appropriate model is this Court's waiver jurisprudence under the Eleventh Amendment. The question then would be whether there is sufficient evidence to conclude that the State has waived its sovereign immunity. *Cf. Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) ("solicitude for States' sovereign immunity underlies the standard that this Court employs to determine whether a State has waived [its Eleventh Amendment] immunity") (brackets added).

In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

*Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (brackets added by Court) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)). The petitioners certainly cannot meet this stringent standard, and do not even attempt to do so.

Finally, even on its own terms, the discrimination standard is inapplicable because the petitioners cannot prove that Maine courts would hear "analogous" state claims. The private petitioners sued Maine seeking overtime under the federal overtime statute, the FLSA. As the Law Court found, there is no doubt that the most analogous state law claim is Maine's state overtime statute. Pet. App. 6a. It should be beyond dispute that Me. Rev.

Stat. Ann., tit. 26, § 664(3) (West Supp. 1997), "is the only statutory provision directly relevant to the central issue on appeal – the State's amenability to suit by state employees for overtime pay." Pet. App. 6a. This conclusion eviscerates the petitioners' discrimination claim because section 664(3) provides that "[t]he overtime provision of this section does not apply to public employees," *id.*, who are defined as "any person[s] whose wages are paid by \* \* \* the State." Me. Rev. Stat. Ann., tit. 26, § 663(10) (West 1988); *see* Pet. App. 6a-7a.

The petitioners take two different approaches to this statutory chasm. The private petitioners simply ignore these statutes. *See* Private Petitioners' Brief at 35-36. The federal petitioners acknowledge the existence of these statutes, but then urge the Court to ignore the most analogous state statutes in its search for an analogous state statute because these statutes could be "an excuse that mask[s] the State's substantive disagreement with federal policy[.]" Federal Petitioners' Brief at 26 n.5. There are numerous problems with this approach.

First, this "standard" does not comport with the discrimination cases relied upon by the federal petitioners in which Court determined whether there were analogous state statutes by determining whether state courts entertained "like" claims, *Clafin*, 93 U.S. at 139, the same claims, *Mondou*, 223 U.S. at 56-67, or the "same type of claim[s]," *Testa*, 330 U.S. at 394. If the search for "analogous" state statutes is even an appropriate enterprise, the Court should search for the most closely analogous state statute. *Cf. North Star Steel Co. v. Thomas*, 515 U.S. 29, 33-34 (1995) (same approach in determining appropriate statute of limitations).

Second, the suggestion that the exemption for the State of Maine in Maine's state overtime statute could be

a mask for disagreement with the policies of the Fair Labor Standards Act is entirely fanciful. There is absolutely nothing in this record to support the conclusion that Maine courts declined to hear the private petitioners' claims for any reason other than Congress' lack of authority to abrogate Maine's sovereign immunity under the Commerce Clause. The fact that the FLSA was involved, as opposed to some other statute passed under Congress' Commerce Clause powers, was entirely beside the point.

Third, "[w]hen the issue of discrimination is assessed at the appropriate level of generality" advocated by the petitioners, Federal Petitioners' Brief at 26 n.5, it becomes no standard at all because it would require all States to hear all federal claims. The petitioners contend that the State has passed "analogous" state statutes because it has created a court of general jurisdiction, *see* Federal Petitioners' Brief at 16; Private Petitioners' Brief at 34, and because it has permitted certain damage claims to be brought against the State. *See* Private Petitioners' Brief at 35; Federal Petitioners' Brief at 24. This, of course, is no limit at all. The petitioners offer no principled basis for determining the "appropriate level of generality," except perhaps the level necessary to determine that there are, in fact, "analogous" state statutes.

Moreover, the suggestion that sovereign immunity is not an ingrained feature of Maine's constitutional landscape is mistaken:

This Court regards immunity from suit as "one of the highest attributes inherent in the nature of sovereignty" and, accordingly, it has said that, generally, a specific authority conferred by an enactment of the legislature is requisite if the sovereign is to be taken as having shed the protective mantle of immunity.

*Cushing v. Cohen*, 420 A.2d 919, 923 (Me. 1981) (quoting *Drake v. Smith*, 390 A.2d 541, 543 (Me. 1978)). It denigrates the importance of sovereign immunity generally, and in Maine in particular, to suggest that any state waiver of sovereign immunity should be treated as permitting the abrogation of all sovereign immunity.

Finally, the petitioners' approach is short-sighted because it simply encourages States to close their doors to all state claims to avoid the prospect that any waiver of the State's sovereign immunity could be treated as an "analogous" statute which requires the state courts to hear federal claims Congress lacks the authority to enact. Thus, rather than providing greater protections for individuals, the petitioners' discrimination theory, if expanded to include this case, would ironically and indubitably lead to a contraction of state-law protections for individuals. Certainly the better approach from both a constitutional and policy perspective is to determine whether the State has clearly waived its immunity to entertain a federal claim notwithstanding Congress' lack of authority to abrogate such immunity.

\* \* \*

The Constitution "contemplates that a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997) (citations omitted). Under its collective bargaining agreements, Maine generally paid its employees overtime on more generous terms than required by the Fair Labor Standards Act, and for employees such as probation officers that Maine thought were exempt from the FLSA, paid them a premium in addition to their regular salary that was more generous than the overtime they could receive under the FLSA. Maine, therefore, fairly paid its

probation officers for providing important governmental services to Maine's citizens. The private petitioners challenged this equilibrium by seeking retroactive money damages against Maine in federal court. Since the petitioners concede, as they must, that Congress lacks the power to abrogate a State's sovereign immunity in federal court, federalism dictates the result in this case – Congress also lacks the power to abrogate a State's sovereign immunity in state court. Succinctly stated, this "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

#### CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

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